

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-2732-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**JIMMY THOMAS,**

**Defendant-Appellant.**

APPEAL from a judgment and an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

DYKMAN, J. Jimmy Thomas appeals from a judgment convicting him of robbery as a repeat offender in violation of §§ 943.32(1) and 939.62, STATS., and an order denying his motion for postconviction relief. Thomas argues that he should be resentenced because his original sentence was based at least in part on improper and inaccurate grounds. We conclude that the trial

court properly exercised its discretion in sentencing Thomas. We therefore affirm.

## BACKGROUND

On February 10, 1994, Jimmy Thomas and Tim Fox entered the Lions Quik Mart in Beloit. While the clerk was waiting on Thomas at the cash register, Fox came behind the counter, struck her on the head several times, and took money from the register. Thomas and Fox shared the stolen money to purchase cocaine.

Thomas was charged with the crime of robbery as a repeat offender, pled guilty on July 25, 1994, and was sentenced on September 8, 1994. The trial court considered several factors in sentencing Thomas and concluded that a fifteen-year prison sentence was appropriate.<sup>1</sup> On July 15, 1995, Thomas filed a motion seeking a vacation of his sentence and resentencing before a different judge on the grounds that the sentence was based in part on improper and erroneous grounds. The court denied Thomas's motion, and Thomas appeals.

## STANDARD OF REVIEW

Sentences imposed by the trial court are deferentially reviewed under an erroneous exercise of discretion standard. *State v. J.E.B.*, 161 Wis.2d 655, 661, 469 N.W.2d 192, 195 (Ct. App. 1991). Under this standard, we presume that the trial court acted reasonably unless the defendant shows some unreasonable or unjustifiable basis in the record for the sentence. *Id.* Unjustifiable sentencing bases include improper or irrelevant considerations. *Id.*

## DECISION

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<sup>1</sup> The court also ordered restitution in excess of \$1,600.

Thomas argues that he is entitled to a resentencing because the trial court's sentencing was based at least in part on improper and inaccurate grounds. Thomas argues that the trial court erred in finding that his prior plea bargains indicate he has an unfavorable demeanor and is a manipulator. Thomas also argues that the court erred in concluding that he is "equally guilty with Mr. Fox." Finally, Thomas argues that the court relied on erroneous facts in concluding that he was unwilling to work, support his child or make restitution.

We do not need to discuss whether the grounds cited by Thomas were improper or inaccurate, however. At Thomas's motion for postconviction relief, the trial court stated that even if it did not consider the factors that Thomas believed were improper or inaccurate, the sentence imposed is still appropriate based on the other sentencing factors mentioned by the court.

When imposing sentencing, the trial court should consider three factors: the gravity of the offense, the character of the offender, and the need for public protection. *McCleary v. State*, 49 Wis.2d 263, 276, 182 N.W.2d 512, 519 (1971). In addition, it is within the court's discretion to consider the following factors: (1) the past record of criminal offense; (2) any history of undesirable behavior patterns; (3) the defendant's personality, character and social traits; (4) the results of a presentence investigation; (5) the vicious or aggravated nature of the crime; (6) the degree of the defendant's culpability; (7) the defendant's demeanor at trial; (8) the defendant's age, educational background and employment record; (9) the defendant's remorse, repentance and cooperativeness; (10) the defendant's need for close rehabilitative control; (11) the rights of the public; and (12) the length of pretrial detention. *State v. Tew*, 54 Wis.2d 361, 367-68, 195 N.W.2d 615, 619 (1972).

The trial court properly relied on the factors set forth in *McCleary* in sentencing Thomas. First, the trial court considered the gravity of the offense. The court noted that Thomas stood by as Fox assaulted and robbed the store clerk, who suffered serious physical and mental damage as a result of the robbery. Thomas then shared in the proceeds of the robbery to purchase cocaine.

Second, the trial court considered Thomas's character. The court noted that Thomas's actions could not be dismissed as youthful indiscretion because he was thirty-five-years old. The court observed that Thomas was a high school graduate and could have led a law-abiding life. The court also considered Thomas's past behavior, including fathering a child outside of marriage and a history of alcohol and drug abuse.

Third, the trial court considered the need for public protection. When considering the need to protect the public, the trial court appropriately considered Thomas's extensive criminal history and stated that the length of his criminal record was the most important factor considered in Thomas's sentencing. Thomas's criminal record is as follows: On February 12, 1979, he pled guilty to two counts of burglary and felony theft. For the first offense, he was sentenced to sixty days in jail and three years' probation, and for the second offense he was placed on three years' probation to run concurrent with the probation for the first offense. On June 1, 1981, he pled guilty to three counts of burglary. A five-year prison term was stayed for each of the burglary convictions and he was placed on five years' probation on each count concurrent, nine months jail, placed in the Rock Valley Alternative Program, and assessed costs, attorney fees and restitution. On October 14, 1983, he was fined \$97.50 for obstructing an officer. On November 21, 1983, he pled guilty to the offense of misdemeanor theft. He was sentenced to one year probation, five days jail, and assessed court costs. On October 6, 1987, he was fined \$97.50 for battery. On October 25, 1988, he was fined \$292.00 for shoplifting and retail theft. He served twelve days in jail for default of payment. On March 16, 1990, he was sentenced to three years in prison for forgery. On August 31, 1990, he was sentenced to three years in prison for attempted residential burglary. This sentence was concurrent with the three-year prison sentence for forgery. Finally, on an unknown date he was fined \$125.00 for carrying a concealed weapon.

It was not unreasonable or unjustifiable for the trial court to sentence Thomas to fifteen years in prison based on his history of criminal behavior, his character and the seriousness of the offense. The trial court did not erroneously exercise its discretion in imposing this sentence.

Thomas argues that if any of the factors considered at the sentencing hearing were improper or inaccurate, the sentencing process must

start over and the trial court cannot, as it did here, find that the sentence was appropriate even when accepting the defense's contentions as true. We disagree.

In support of his position, Thomas cites to both *Brozovich v. State*, 69 Wis.2d 653, 230 N.W.2d 639 (1975), and *State v. Fuerst*, 181 Wis.2d 903, 512 N.W.2d 243 (Ct. App. 1994). In *Brozovich*, the trial court sentenced the defendant to eight years in prison in part because it felt that the defendant had "gimmicked" the court by obtaining fifteen adjournments before sentencing. *Brozovich*, 69 Wis.2d at 659, 230 N.W.2d at 643-44. The Wisconsin Supreme Court remanded the case for resentencing because there was no specific proof that the adjournments were the defendant's responsibility. *Id.* at 662, 230 N.W.2d at 645. The court concluded that "consideration of the number of adjournments, without proof of the defendant's responsibility thereof, constitutes an abuse of discretion." *Id.* at 662-63, 230 N.W.2d at 645.

In *Fuerst*, the trial court rejected probation for the defendant, basing its decision on several factors, including its belief that the defendant had "very little religious conviction." *Fuerst*, 181 Wis.2d at 909, 512 N.W.2d at 244. We concluded that "it is unconstitutional to use a lack of religious beliefs to determine an appropriate sentence" and remanded the case for resentencing. *Id.* at 914, 915, 512 N.W.2d at 247.

Thomas's case is distinguishable from *Brozovich* and *Fuerst*. At Thomas's postconviction hearing, the trial court explained its sentencing decision by stating that the sentence was appropriate when considering only the factors that both parties accepted as proper. In neither *Brozovich* nor *Fuerst* did the trial court clarify its sentencing rationale. In *Fuerst*, we implied that if the court had clarified its sentencing decision, we would have upheld the sentence:

The court had the opportunity at the postconviction hearing to clarify its statements concerning Fuerst's religious convictions and practices, and to state that it in fact did not consider those factors when it imposed sentence. The court, however, did not do so. Because the trial court did not state on the record that it was not considering Fuerst's lack of religious

convictions ... [w]e are ... compelled to reverse the order, vacate the sentence and remand the matter for resentencing without the consideration of Fuerst's religious beliefs or practices.

*Id.* at 915, 512 N.W.2d at 247. Here, however, the trial court did clarify its statements, noting that its sentencing decision was appropriate even if it did not consider the factors Thomas contends are improper.

Thomas's case is more analogous to *State v. Way*, 113 Wis.2d 82, 334 N.W.2d 918 (Ct. App. 1983). In *Way*, the trial court sentenced the defendant to the maximum term of imprisonment for his conviction for escape. *Id.* at 90, 334 N.W.2d at 921. The trial court considered numerous factors, including a presentence report, in imposing Way's sentence. *Id.* at 91, 334 N.W.2d at 922. When Way requested the trial court to modify his sentence, he revealed an error in the sentencing report to the court. *Id.* Way argued that the trial court abused its discretion by relying on the erroneous presentence report. *Id.* We affirmed the trial court's order, stating:

The trial court in refusing to modify his sentence obviously did not believe this error justified a modification of Way's sentence. On appeal, we agree with the trial court; we find there are sufficient other facts presented in the record which would justify the trial court sentencing Way to three years' imprisonment.

*Id.* Likewise, we find that when not considering the facts controverted by Thomas, there are still sufficient facts presented in the record to justify Thomas's fifteen-year prison sentence.

Thomas argues that *Way* is not applicable to his case because Way sought postconviction modification of his sentence, while Thomas seeks resentencing. We fail to see the importance of Thomas's distinction. Regardless of whether the defendant seeks sentence modification or resentencing, our standard for reviewing the trial court's sentencing is the same: "[W]e will remand for sentencing or modify the sentence only when an abuse of discretion clearly appears." *McCleary*, 49 Wis.2d at 278, 182 N.W.2d at 520. We conclude

that the trial court did not erroneously exercise its discretion, and therefore affirm.

*By the Court.* – Judgment and order affirmed.

Not recommended for publication in the official reports.